STATE OF MICHIGAN

COURT OF APPEALS

RYAN BARRY, by his Next Friend, TERESA PELLONPAA,

Plaintiff-Appellant,

v

ISHPEMING-NICE COMMUNITY SCHOOLS, and JAMES IWANICKI,

Defendants-Appellees.

UNPUBLISHED
November 15, 2005

No. 262826
Marquette Circuit Court
LC No. 04-041640-NI

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

O'CONNELL, P.J. (*dissenting*).

Because I disagree with the majority's myopic application of the "gross negligence" standard, I respectfully dissent.

Ryan Barry was a 170-pound left guard on defendants' varsity football team. He injured his ankle in a Friday-night game during a trap play. His assignment was to pull out of position and charge along the offensive line, clearing the lane of rushing defensive linemen and blitzing linebackers. He was hit in the ankle by two helmets simultaneously, and he rolled his smashed foot inward and backward, twisting and straining his ankle ligaments under his weight. He felt his ankle "pop." Nevertheless, he played the rest of the offensive possession and continued to play well into the fourth quarter. After the game, the team trainer opined that the injury was a mild sprain and wrapped it. Barry iced it over the weekend.

On Monday, the head coach wrapped the ankle and told Barry to practice. Barry suited up and ran some warm-up drills. For example, he participated in the sled drill, which involved several linemen hitting and driving back tackling dummies attached to a large steel sled. He also participated in a "fit and drive" drill which involved one player ramming a large, cushion-like blocking shield held by another player and pushing the holding player and shield back several yards. For the "fit and drive" drill, Barry held a shield while the team's 265-pound center rammed into it and drove forward with his legs. Barry told the center to take it easy because his ankle hurt, so the two teammates merely went through the motions.

The line coach, defendant Iwanicki, saw the center's half-hearted effort and sloppy technique and immediately chastised him. Iwanicki, a 230-pound ex-lineman, proceeded to demonstrate the proper technique by driving his own body into plaintiff's shield, driving Barry

back. Barry later stated that, following Iwanicki's first blow, "I felt a sharp pain go to my ankle." Iwanicki noticed that Barry held the shield gingerly and did not provide enough resistance so Iwanicki could stay low and effectively push forward. Iwanicki grew angrier and told Barry to "hold the damned bag." Barry held the bag again and later stated that when Iwanicki hit the bag the second time, "I took another step back. And I felt something go in my ankle and I told him that I couldn't do it anymore." Iwanicki, in a fit of rage, ordered Barry off the field.

Barry walked ten yards to the edge of the field, but he continued to exchange heated words with Iwanicki about Iwanicki's expectations and Barry's lack of effort and heart. Barry pushed his helmet back on his head, drank some water, and then asked Iwanicki what he wanted him to do now. Iwanicki walked to the edge of the field and, blocking shield in hand, told Barry in colorful but unambiguous terms that he wanted him to hold the bag. During this final exhortation, Iwanicki shoved the shield up into Barry's chest and face. Barry stumbled back a few steps.

The majority finds Iwanicki's actions "so reckless as to demonstrate a substantial lack of concern for whether an injury [would] result[]." MCL 691.1407(7)(a). I disagree.

To demonstrate the required degree of recklessness, Iwanicki must have shoved the shield into Barry so hard that it demonstrated Iwanicki's lack of concern that it would injure Barry, who was the coach's starting left guard and defensive tackle. Except for the pushed-back helmet, Barry was wearing all his football pads, and Iwanicki hit Barry with a blocking shield designed to cushion the heavy blasts of charging nosetackles. Therefore, Barry must plead and show a collision that would demonstrate a disregard for injuring a fully padded starting lineman.[1] This would necessarily require a showing of a hard, full-strength blow directed at an area that the pads did not protect.[2] Perhaps if the blow with the shield had broken Barry's nose, or his head had snapped back, causing neck damage, Barry could substantiate his claim.[3] But Barry merely took a few surprised steps backward and put his hand down to catch his balance. He did not tumble over, even after he allegedly felt his ankle "snap." Using common sense, the blow was

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[1] While the majority criticizes my emphasis that Barry was in his pads, the standard requires us to review the facts that would demonstrate a substantial lack of concern that the actions would injure the player. Therefore, we must consider that Iwanicki hit a big, padded player with a blocking pad and take into account the amount of force he used.

[2] To hold that any hard contact will suffice would prevent a coach from ever demonstrating techniques that require hard physical contact, such as a forearm shiver, swim move, or a pulling block.

[3] I do not mean that no liability would follow from actions that fell short of this brutal behavior if a plaintiff claims battery. This case does not involve a battery, however, so our sole concern is whether the undisputed facts regarding the contact demonstrate a reckless disregard for whether the contact would cause injury. Because Iwanicki knew that Barry was fully padded, contact that would satisfy this standard would have to be extreme even for football standards.

controlled and calculated to stun Barry and arouse his emotions, not injure him. Therefore, while ultimately foolish and completely ill-advised, Iwanicki's jolt did not demonstrate the kind of reckless disregard for injury that the statute requires. MCL 691.1407(7)(a).

Under the circumstances, the evidence could only meet the standard for gross negligence if Iwanicki knew that Barry's ankle was so weak that even an awkward step backward could damage it. On this point, Barry asserts that he previously told Iwanicki that he had rolled his ankle and that it hurt. However, Barry also insists that before Iwanicki shoved the shield into him, the coaches and trainer declared that his injury was no more than a minor sprain. He admitted that he continued to play offensive tackle on the night of the original injury, walked on the ankle after the game, and walked without a limp on the following Monday before practice. Barry fails to explain how Iwanicki knew that a mild, taped sprain could lead to torn ligaments if Barry were forced to step backwards. In fact, Barry had just finished participating in a drill where he took several steps backward holding a shield against the full thrusts of Iwanicki and the team's center. Therefore, the majority overstates the degree of knowledge that Iwanicki could have possessed regarding the ankle and fails to indicate what potential injury Iwanicki was recklessly disregarding if he was not disregarding the possibility of injuring Barry's ankle.[4]

Also, while Barry claims that the drill caused him pain, he vehemently denies that it led to his injury, with good reason. Even the majority concedes that if the drill caused the torn ligaments, then Barry failed to demonstrate compensable fault because of his willing participation in the drill. However, the majority fails to draw any legal distinction between Iwanicki's actions on the field and his actions on the sidelines. Certainly, if this case turns on Iwanicki's knowledge of the ankle injury and the excessive use of force, then Iwanicki was also grossly negligent for driving his entire body into Barry during the drill. If the delineating factor is Barry's voluntary participation in the drill, then the majority has drifted away from gross negligence and into the area of consent to battery without discussing the corresponding legal principles.[5] The majority apparently fails to appreciate that it is setting a precedent for the "gross

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[4] The majority misreads my analysis as an extralegal requirement that Barry may not recover unless Iwanicki knew that he would cause the specific ankle injury. Actually, I simply lack the creativity to dream up injuries that could have resulted but did not, especially in this case. If Iwanicki could not have anticipated that Barry stepping backward would result in his ankle being injured, then Iwanicki would not have recklessly disregarded its possible occurrence, and we should affirm. I find it oddly necessary to reiterate the nugget of common sense that should drive this case: coaches hate injuries, especially to their starters. But the legal standard requires Barry to demonstrate that when Iwanicki acted, he acted without any regard for whether he would injure Barry. In other words, does Barry demonstrate that Iwanicki was so out of control that he no longer cared that he might be benching his starting right tackle for the rest of the season? The facts do not demonstrate this level of carelessness. A football coach shoving a blocking shield at a fully padded starting lineman only hard enough to knock him back a few steps simply does not demonstrate an attitude of complete indifference that the lineman will get hurt.

[5] Barry was not battered because the parties were voluntarily participating in a rough recreational activity. *Ritchie-Gamester v Berkley*, 461 Mich 73, 85; 597 NW2d 517 (1999); *Behar v Fox*, 249

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negligence" of coaches generally, not just those that physically express their anger with players on the sidelines.[6] Therefore, any contact between a coach and a player that could cause the player to stumble now suffices to create a jury question regarding the coach's recklessness. Moreover, because the majority does not limit its holding to nonconsensual intentional contact by a coach, players with any history of injury would require special protection from *any* contact, or their coaches might be found reckless for disregarding the potential for further injury. The majority distorts the standard to right a perceived wrong rather than applying the standard to the

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Mich App 314, 317-318; 642 NW2d 426 (2002). At the time of the injury, Barry was voluntarily participating in the football practice; a fact evidenced by his ongoing verbal exchange with Iwanicki. In football, as in other contact sports, instruction and training may well, and often does, involve physical contact between players and coaches. *Behar*, *supra.* This contact may illustrate a fundamental skill (the "fit and drive" drill), motivate or encourage a player (a slap on the top of a helmet or shoulder pads after a good play), or correct a player (pushing him into position or pulling him closer to deliver instructions). On a mall escalator, or even in a saloon, each of these actions would probably constitute battery. On a football field they can be an integral part of the emotional and physical formation necessary for success. While Iwanicki's actions were ultimately detrimental, the legal standard for battery is not whether an injury results from a coach's conduct, but whether, applying common sense, the conduct was reckless, well outside the bounds of fair play, and a risk that was unassociated with the chosen activity. *Ritchie-Gamester*, *supra*, at 86, 89, 94. While I can easily imagine a coach's behavior satisfying this standard, Iwanicki's did not. Indisputably, Iwanicki's purpose was to encourage his team, specifically Barry, to play tougher despite discomfort or weakness, and his actions were calculated to convey this sentiment without causing injury. Therefore, in the circumstances of this case, Barry may not rely on the fact that Iwanicki intended the contact, but must also establish recklessness in its execution.

[6] Perhaps it would help if the majority provided football coaches with a handbook on coaching etiquette. After all, few coaches want to face hundreds of thousands of dollars in liability without knowing how soft their kid gloves must be to avoid contact that we may later brand "reckless" or the product of "gross negligence." The lack of guidance in the majority opinion is particularly alarming because it completely avoids analysis under *Ritchie-Gamester* or *Behar*, even though those cases deal as much with negligence as intentional torts. Under the majority's analysis, a jury could find that a quick no-look pass to an unsuspecting basketball player could slip through surprised hands and break a young player's nose, leaving a part-time or volunteer coach to pay for reconstructive surgery. According to the majority, if the coach could see the potential for injury on a cool, clear day with a pair of binoculars, but made the pass anyway, a jury should decide whether the pass was reckless. Any corrective tug on a horse collar, facemask, jersey, or other gear will create a genuine issue of fact regarding the coach's indifference that he or she could hurt the player. The factual possibilities are endless, and the legal boundaries between them are indecipherably blurred. I recommend that coaches approach their teams as a nervous chemistry teacher cautiously approaches an advanced placement lab, guarding their every word and deed against mistake or misunderstanding. It is better that coaches take their losses on the field rather than in their bank accounts.

facts. Because the contact in this case did not demonstrate the degree of recklessness required in MCL 691.1407, the trial court correctly dismissed Barry's tort claim. Therefore, I would affirm.

/s/ Peter D. O'Connell